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No. 93-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

vs.

HARDY M. SNOW, JR. and
ACCREDITED SURETY & CASUALTY
COMPANY, INC.,
Respondents.

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CANADIAN HELSINKI WATCH GROUP IN SUPPORT OF PETITIONER

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MOTION OF THE CANADIAN HELSINKI WATCH GROUP FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

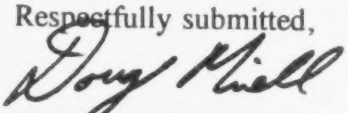
The Canadian Helsinki Watch Group respectfully moves for leave to file the annexed brief as *Amicus Curiae* in this case. Petitioner has consented to the filing of the brief; respondents have not confirmed their refusal or consent.

The Canadian Helsinki Watch Group is the Canadian member of the International Helsinki Human Rights Federation headquartered in Vienna, Austria, and is a non-governmental organization dedicated to promoting respect for the human

rights components of the Helsinki Accord. The Helsinki Accord is the Final Act of the Conference of Security and Cooperation in Europe signed in Helsinki, Finland in 1975.

The amicus is interested in opposing any violation of international human rights. It is particularly interested when the violation is committed by a signatory to the Helsinki Accord and the victim is a Canadian citizen. Because these issues are raised in this case, we respectfully seek leave to submit this *amicus curiae* brief for the Court's consideration.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

The Canadian Helsinki Watch Group is the Canadian member of the International Helsinki Human Rights Federation headquartered in Vienna, Austria, and is a non-governmental organization dedicated to promoting respect for the human rights components of the Helsinki Accord. The Helsinki Accord is the Final Act of the Conference of Security and Cooperation in Europe signed in Helsinki, Finland in 1975.

The Helsinki Accord provides that the participating states will respect the territorial integrity of each of the participating states. (Declaration of Principles Guiding Relations between Participating States, Article III). It further provides that participating states will refrain from any act of coercion designed to subordinate to their own interests the exercise by another participating state of the rights inherent in its sovereignty and thus to secure advantages of any kind. (Article VI) Under the Accord, each participating state recognizes the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and cooperation among themselves as among all states. (Article VII) Both Canada and the United States are signatories to the Helsinki Accord.

The above provisions, and the Helsinki Accord generally, link respect for human rights with friendly relations between states. That linkage is particularly close when human rights violated by one state are the human rights of a citizen of another signatory state. These violations, in particular, are likely to jeopardize friendly relations between signatory states.

The amicus is interested in opposing any violation of international human rights. It is particularly interested when the violation is committed by a signatory to the Helsinki Accord and the victim is a Canadian citizen.

STATEMENT OF THE CASE

The Amicus accepts the statement of the case in the Petition for Writ of Certiorari of the Petitioner.

SUMMARY OF ARGUMENT

1. The abduction of Sidney Jaffe, the husband of the Petitioner, is a violation of international human rights law.

2. This violation vests in Ruth Jaffe a right to compensation at international law.

3. Failure to comply with the relevant international law would offend the public policy and sense of moral justice of the U.S. courts.

ARGUMENT

1. The Abduction of Sidney Jaffe is a Violation of International Law.

The courts in the United States have recognized that international law prohibits the illegal seizure, removal and detention of an alien against his will in a foreign country. The Second Circuit in U.S. v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974), held specifically that international kidnappings violate the United Nations Charter. The Court referred to a long standing principle of international law that abductions by one state of persons located within the territory of another violates the territorial sovereignty of the second state. Id. See also Nguyen Da Yen v. Henry Kissinger, 528 F.2d 1194, 1201 fn. 13 (9th Cir. 1975) (illegal seizure, removal and detention

of Vietnamese children to the U.S. by various agencies of the U.S. government is a violation of the law of nations).[1]

This principle has in fact been applied directly to condemn the conduct of the Respondents in this case. In Jaffe v. Boyles, 616 F.Supp. 1371, 1379 (W.D.N.Y. 1985), a case involving the Petitioner and the Respondents in this case, Chief Judge Curtin of the United States District Court, Western District New York, held that the conduct of the Respondents may well amount to a tort in violation of the law of nations.

It is further recognized that international law prohibits a tort in violation of the law of nations regardless of whether the wrongdoer is acting for a state or on his own. In Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) the Court first noted that an action by a state official in violation of the constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could not properly be characterized as an act of state. Id. The Court then held that nonetheless the alleged torture causing death by Pena-Irala of Joelita Filartiga violated the law of nations. Id. at 890.

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[1] It is now accepted that international human rights law is violated where the state violates internationally recognized rights and the victim is one of its own citizens. Yet even during the period when the U.S. courts questioned whether the international law of human rights applied to a state's treatment of its own citizens, there was no question that it applied to a state's treatment of foreign nationals. See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). Thus, while it cannot be said that violation of the international human rights of a foreign national is a greater violation of international law than violation of the international human rights of the state's own citizens, the violation of the rights of a foreign national is a violation that has a longer history of recognition in international law and the U.S. Courts. In that sense, the failure of the Florida courts to pay heed to the violation in this case is a particularly egregious disregard of international human rights law.

The amicus submits that a wholly private act done by a person that has no connection with government, who acts even in opposition to government, may still violate international law. See J.G. Starke, "Introduction to International Law", (9th Ed. 1984) at Chapter Three. But this principle need not be tested here. It is undeniable that in this case the Respondents were acting on behalf of, and by color of the law of, the State of Florida.

The nexus between Respondents' wrongdoing and the Government of the State of Florida is established by the following undisputed facts. The Respondents arranged for the abduction in order to bring Sidney Jaffe before the Florida state courts. The Respondents were expressly acting pursuant to a Florida state law that allows for the arrest of a principal within the state both before and after the forfeiture of a bail bond. Indeed, the Florida state court in this case expressly stated that the public policy of Florida favors and sanctions the apprehension of a bond jumper within the state. See Opinion Rom Powell, Circuit Judge, Ninth Judicial Circuit, Orange County, Florida, Petition for Writ of Certiorari, page A-23. Further, when Sidney Jaffe was abducted and brought before the Florida courts, the Florida courts assumed jurisdiction over him despite his illegal arrest and detention, and proceeded to judgment on the charges against him.

The fact that the Respondents' acts went beyond what the laws of the State of Florida allow does not change the official character of their acts. If acts of an official character were restricted only to acts that the law of the state allowed, then the law of nations would never be violated by the most egregious wrongs of those acting for the state. This nonsensical result is not the law. See Forti v. Suarez-Mason, 672 F.Supp 1531, 1546 (N.D.Cal. 1987).

The Florida courts in this case have refused to recognize the violation of international law by the Respondents, and have refused to enforce the Canadian judgment for reparations obtained by Petitioner, for a single reason -- the

wrongdoing of Sidney Jaffe. Florida's analysis is flawed for two reasons.

First, the Petitioner submits that her position is not derivative of that of Sidney Jaffe. The amicus endorses that position. Second, the amicus submits further that, even if the Florida courts are correct and the judgment in favor of the Petitioner derives from any claim that Sidney Jaffe might make, the violation of international law remains.

International kidnapping is wrongful not only when the kidnap victim is innocent of all wrongdoing. It is a violation of international law no matter what the crimes the kidnap victim has committed. This principle was illustrated in the case of Adolf Eichmann who was accused, and ultimately convicted, of Nazi war crimes. In response to a formal complaint filed by Argentina, the Security Council of the United Nations adopted a resolution condemning the kidnapping of Adolf Eichmann to Israel in 1960 and requesting Israel to make reparations "in accordance with the Charter of the United Nations and rules of international law." U.N. document S/4349, June 23, 1960. Adolf Eichmann was of course charged with and convicted of crimes incommensurably more heinous than those alleged against Sidney Jaffe.

2. The Violation of International Law Committed Against Sidney Jaffe Vests in Ruth Jaffe a Right to Compensation at International Law.

A. The Right To Compensation Is Recognized Under International Law.

Under international law, victims of human rights violations have a right to compensation. A detailed study of this right is set out in a sequence of reports prepared by a United Nations Special Rapporteur, Theo Van Boven, for the United Nations Subcommission on Prevention of Discrimination and Protection of Minorities. See "Study Concerning the Right to Restitution, Compensation and

Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms", U.N. document numbers E./CN.4/Sub.2/1990/10, 26 July 1990; E/CN.4/Sub.2/1991/7, 25 July 1991; E/CN.4/Sub.2/1992/8, 29 July 1992. See also Theo Van Boven, "The Right to Restitution, Compensation and Rehabilitation", printed in "Justice not Impunity" (International Commission of Jurists, 1992).

The state responsible for the violation has a duty to pay compensation. The duty to pay attaches to the state even where, as here, the act is committed by an entity which is not part of the formal structure of the state but which is empowered by the internal law of that state to exercise elements of the governmental authority. Article 7, Draft Articles of State Responsibility, International Law Commission, (1979) 18 I.L.M. page 1569. In this case, the responsibility of the U.S. is engaged because the Respondents were empowered by the law of Florida to exercise elements of governmental authority, in particular, the power to arrest and detain a bail jumper, and because the Respondents were purporting to act in the exercise of that authority in the abduction of Sidney Jaffe.

The wrong that was done to Ruth Jaffe at international law vests in her a right to compensation in at least two ways. First, the International Covenant on Civil and Political Rights provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 9(5). The United States has signed and ratified the Covenant. Sidney Jaffe was subject to an arrest and detention that was unlawful according to international law and, accordingly, he has a right to compensation. If, as held by the Florida Court of Appeals, Fifth District, the claim of Ruth Jaffe is derivative from a cause of action Sidney Jaffe might have, then Ruth Jaffe herself has right to compensation under this heading. The finding of the Court of Appeals that the claim of Ruth Jaffe is derivative thus strengthens her claim under international law, rather than weaken it.

Second, the abduction of Sidney Jaffe, aside from violating his right to be free from unlawful arrest and

detention, violates rights specific to Ruth Jaffe. The International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary or unlawful interference with her privacy, family or home. Everyone has the right to protection of the law against such interference or attacks. Article 17.

The kidnapping of Sidney Jaffe was an arbitrary and unlawful interference with the privacy, family and home of Ruth Jaffe. By virtue of his kidnapping, Ruth Jaffe is entitled to the protection of the law to remedy the arbitrary and unlawful interference with her rights.

B. The Duty to Pay Compensation Would be Respected by Allowing Enforcement of the Canadian Judgment Against the Respondents.

The Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights guaranteed them by law. Article 8. "Law" in this context includes international human rights law. The International Covenant on Civil and Political Rights commits each state party to the Covenant to ensure that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy and shall develop the possibilities of a judicial remedy. Article 2.

Canada, a signatory to the Covenant, provided Ruth Jaffe with a remedy for the violation of her rights. For the remedy to be effective, the judgment must be enforced in the U.S. If the U.S. courts fail to enforce the judgment granted in Canada, the U.S. will have violated its obligation under the Universal Declaration and its commitment under the Covenant to provide an effective remedy for the violation of Ruth Jaffe's rights.

Further, every state, whether responsible for violations or not, has a duty not to grant immunity to international human rights violators. The United States, by not enforcing the

Canadian judgment against the Respondents, would violate the duty not to grant immunity imposed on U.S. by international law. This is particularly true because the American Declaration of the Rights and Duties of Man provides that every person may resort to the courts to ensure respect for his legal rights. Article 18. The Inter-American Commission on Human Rights, in cases against Argentina and Uruguay dated October 20, 1991, concluded that the laws of those countries which granted immunity to violators of human rights were in violation of the right to justice found in Article 18. The United States is bound by the Declaration by virtue of its being a signatory to the Charter of the Organization of American States.

One of the justifications for the Florida courts' refusal to enforce the Canadian judgment is their expressed belief that compensation is not necessary as a deterrent to the illegal behavior. The Florida Court, Ninth Judicial Circuit, Orange County, stated that as a result of the decision in Kear v. Hilton, 699 F.2d 181 (4th Cir.1983), the criminal laws of Canada and the U.S.-Canada extradition treaty should provide a sufficient deterrent to kidnapping in Canada by U.S. bounty hunters in the future. Petition for Writ of Certiorari, page A-24. The Kear case decided that the bounty hunters could be extradited to Canada for trial on charges arising out of the abduction of Sidney Jaffe. The bounty hunters were extradited, tried, convicted and sentenced in Canada. See Petition for Writ of Certiorari, page A-36.

The amicus submits, firstly, that even accepting that the Kear case provides a deterrent to bounty hunters, it does not provide a deterrent to those who arrange for bounty hunting. In this case the Respondents are not the bounty hunters who were extradited to Canada for trial. If judgment is not enforced against the Respondents, they will have suffered no consequences from their wrongdoing.

The amicus submits, secondly, that even if the potential extradition of kidnapper bounty hunters is a sufficient deterrent against kidnapping, relying on that consideration to deny

compensation ignores the independent principle of compensation for violations of international human rights wrongs. Deterrence may prevent others from being victimized in the future. Deterrence does not compensate for the victimization that has already taken place. The victim herself, in this case Ruth Jaffe, must not be forgotten.

3. Failure to Comply With the Relevant International Law in This Case Would Offend the Public Policy and Sense of Moral Justice of the U.S Courts.

The Florida Court of Appeal, Fifth District, refused to enforce the Canadian judgment on the ground that to do so would offend the public policy and sense of moral justice of the jurisdiction. Petition for Writ of Certiorari, page A-8. The amicus submits that the reverse is true, that not to enforce the canadian judgment would be to offend public policy and the sense of moral justice of the U.S. courts.

As discussed above, not permitting enforcement of the Canadian judgment in the U.S. would result in a violation of international human rights law. Further, where a state grants immunity to a violator of international human rights norms, it becomes complicit in the violations. It cannot be part of public policy that the U.S. courts will disregard these well-accepted principles of international law.

It must be remembered that the American courts have already accepted the wrongfulness under international law of the abduction of Sidney Jaffe. As previously noted, the United States government extradited the bounty hunters to Canada, see Kear v. Hilton, supra, Johnson v. Kear (1989) 5 C.C.C. (3d) 574 (Ont.C.A.). The Florida courts did not prevent this extradition. For the U.S. courts now to grant immunity to the Respondents who hired the bail recovery agents to commit the acts for which they were extradited would be inconsistent.

It should also be remembered that the U.S. courts, for the abduction of Sidney Jaffe, have already permitted criminal sanctions through extradition. It is therefore inconsistent for

these courts to deny the less stringent remedy of compensatory damage on grounds of public policy.[2]

The rulings of the Florida courts were apparently motivated by the desire to ensure respect for the Florida legal system. But respect for Florida law cannot be won at the cost of disrespect for international law, particularly where there is a legal solution available that allows respect for both legal systems. The State of Florida could request the extradition of Sidney Jaffe for jumping bail, but has declined to do so. See Petition for Writ of Certiorari, page A-4. Requesting extradition of Sidney Jaffe for his violation of Florida law and permitting compensation to the Petitioner for the violation of international law would allow both the Florida legal system and the international legal system to be respected.

Finally, there is a compelling diplomatic reason to enforce the Canadian judgment entirely ignored by the Florida courts. The Government of Canada has referred to the Jaffe abduction as "a blatant infringement of Canadian sovereignty" and filed formal protests with the U.S. government objecting to the abduction. The U.S. Government has recognized that the Jaffe case threatens to have a deleterious effect on U.S. relations with Canada, and, indeed, has acknowledged that the case has intruded on its relations with Canada. Petition for Writ of Certiorari, pages A-35, 36.

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[2] The judgment of the Ninth Judicial Circuit, Orange County Florida additionally cites as a rationale a difference between Canadian tort law and Florida tort law. Petition for Writ of Certiorari, A-23. Under Florida tort law a surety for a bail bond may arrest the principal, both before and after forfeiture. Under Canadian law, no such arrest is possible. However, both the judgment of the Florida Circuit Court and the Judgment of the Florida Court of Appeal, Fifth District, ignore the federal Alien Torts Law, 28 U.S.C. § 1350, which provides a remedy for the very wrong at issue here. See Jaffe v. Boyles, supra.

The deterioration in relations between Canada and the U.S. because of the abduction of Jaffe is not hypothetical. It is real and documented. While respect for international human rights law is an end in itself, it also serves a further end, the promotion of friendly relations between states. Enforcement in the U.S. of the Canadian judgment awarded to Ruth Jaffe against the Respondents would help to repair the damage to U.S.-Canada relations that has already been inflicted. The Florida courts nowhere take this factor into account in their public policy considerations. The amicus submits that the Florida courts have erred by this omission.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 8, 1993.

Respectfully submitted,

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